the Parole Board
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[2020] PBRA 84

Application for Reconsideration by Millanaise

The Application

1. This is an application by Millanaise ("the Applicant") for reconsideration of a decision of a panel of the Parole Board ("the panel") not to direct his release on licence. The decision was made by the panel on 19 May 2020 after an oral hearing which commenced on 17 October 2019 but was adjourned and then completed on 7 May 2020.

2. This application has been allocated to me as one of the members of the Board who are authorised to make decisions on reconsideration applications. I have considered the application on the papers.

3. The documents initially provided to me were:
   (1) The dossier considered by the panel, which contains 752 numbered pages;
   (2) The panel's decision of 19 May 2020;
   (3) Representations dated 20 June 2020 by the Applicant's solicitors in support of the application; and
   (4) An e-mail sent on 18 June 2020 on behalf of the Secretary of State, which states that he offers no representations in respect of the application.

4. A number of additional documents (communications after the hearing on 7 May 2020) were later supplied at my request. These will be referred to in Paragraphs 27-32 below.

Background

5. The Applicant is now aged 25. He is a young man with a serious criminal record which commenced at the age of 13. He is now serving a sentence of detention for public protection for a series of sexual offences. He was aged 17 at the time of those offences and 18 when he was sentenced. His tariff, set at four and a half years less time served on remand, expired in January 2017.

6. In April 2017 a previous panel of the Board, after an oral hearing, advised the Secretary of State that the Applicant was ready to be transferred to an open prison. The Secretary of State agreed, and the Applicant was duly transferred in August 2017. He appeared to be doing quite well, progressing through the open prison regime to the point where he had had two unescorted day releases. However, in July 2018 he was returned to a closed prison after he was said to have been found

in possession of a mobile phone (concealed in his DVD player), drugs and other items (concealed on his person).

7. The circumstances of this alleged discovery are the subject of dispute. The Applicant denies possession of any of the items in question, and asserts that the evidence against him was fabricated. There has been no disciplinary or court finding about where the truth lies. A disciplinary charge was brought but was dismissed on technical grounds; and a police investigation resulted in a decision that no charge should be brought against the Applicant (the basis of that decision was that there was insufficient evidence to prove that the drugs were intended for supply to anyone else and it was not in the public interest to prosecute him for simple possession).

8. The Applicant remains in a closed prison. The Board's remit is to decide whether to direct his release on licence and, if not, to advise the Secretary of State about his suitability for a return to an open prison. The panel decided not to direct release, but to recommend a move back to an open prison.

The Relevant Law

The tests for release on licence and recommendation for open conditions

9. The test for release on licence is whether the prisoner's continued confinement in prison is necessary for the protection of the public.

10. The decision about whether to recommend transfer to open conditions has to be based on a balanced assessment of risk and benefits, with an emphasis on risk reduction and the need for the prisoner to have made significant progress in changing his attitudes and tackling his behaviour problems in closed conditions. Without evidence of such progress the Secretary of State will not generally authorise a move to an open prison.

The rules relating to reconsideration of decisions

11. Under Rule 28(1) of the Parole Board Rules 2019 a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence. A decision to recommend or not to recommend a move to an open prison is not eligible for reconsideration.

12. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by
    - a paper panel (Rule 19(1)(a) or (b)); or
    - an oral hearing panel after an oral hearing, as in this case (Rule 25(1)); or
    - an oral hearing panel which makes the decision on the papers (Rule 21(7)).

13. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on either or both of two grounds: (a) that the decision is irrational or (b) that it is procedurally unfair.

14. The decision of the panel in this case not to direct release on licence is thus eligible for reconsideration, and is made on both of the above grounds.

Irrationality

15. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said at para. 116

> *"the issue is whether the release decision was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."*

This was the test set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374**. It applies to all applications for judicial review.

16. The Divisional Court in **DSD** went on to indicate that in deciding whether a decision of the Parole Board was irrational, due deference had to be given to the expertise of the Parole Board in making decisions relating to parole.

17. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under rule 28: see **Preston [2019] PBRA 1** and others.

Procedural unfairness

18. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed, and therefore producing a manifestly unfair, flawed or unjust result. These issues (which focus on how the decision was made) are entirely separate from the issue of irrationality which focusses on the actual decision.

19. The kind of things which might amount to procedural unfairness include:
    (a) A failure to follow established procedures;
    (b) A failure to conduct the hearing fairly;
    (c) A failure to allow one party to put its case properly;
    (d) A failure properly to inform the prisoner of the case against him or her; and/or
    (e) Lack of impartiality.

20. The overriding objective is to ensure that the case was dealt with fairly.

The Current Parole Review

21. This review of the Applicant's case began in February 2018 when the Applicant was still at the open prison. Reports in May 2018 by the probation officer then responsible for supervising the Applicant in prison (A) and the one prospectively responsible for supervising him in the community (B) indicated that it was too early to make recommendations but that if the Applicant continued his good progress it

was quite likely that in due course it would be appropriate to recommend his release on licence.

22. Matters were then overtaken by the Applicant's return to closed conditions in July 2018 (see paragraphs 5-6 above).

23. In July 2019 the evidence was reviewed on paper by a single member of the Board who directed that the case should proceed to an oral hearing.

24. On 17 October 2019 a lengthy hearing took place at which the panel took oral evidence from the Applicant, from the two probation officers who had by then become responsible for supervising him in prison (C) and prospectively in the community (D) and from two members of staff at the open prison. The Applicant was legally represented by a solicitor. The hearing was adjourned until 7 May 2020.

25. Matters were then further overtaken by the COVID-19 pandemic and the restrictions imposed in consequence of that. As a result of those restrictions the adjourned hearing on 7 May 2020 was conducted by telephone link. The Applicant was represented by the same solicitor as before. Oral evidence was again taken from the Applicant and from the probation witnesses C and D.

26. At the close of the hearing it was agreed that the Applicant's solicitor should provide her closing representations in writing. She wished, quite reasonably, to be able to discuss the case privately with the Applicant before formulating her representations.

27. In addition, there was an outstanding piece of evidence with which she obviously wished to deal with in her representations. There had been further security concerns in late 2019: in particular in November 2019 the Applicant was reported to have barricaded himself in his cell and then become abusive and physically confrontational to an officer. The officer reported being in fear and having to call for assistance. On adjudication, a disciplinary charge in respect of that matter was found proved, and the Applicant received a penalty of cellular confinement and 50% stoppage of earnings. He told the panel that he had appealed against that adjudication and it had been overturned. It was agreed that he would provide the paperwork which supported that claim.

28. The Applicant himself did not have the paperwork: he says that he was informed of the successful outcome of the appeal by staff in the unit where he was detained, and that he was never given any document recording the outcome of the appeal. In the circumstances C agreed to try to obtain the documentation for him from the prison authorities.

29. Unfortunately, despite repeated efforts by C and the Applicant's solicitor, the documentation never came to light. At my request I have been provided with copies of e-mails which show that their efforts continued even after the panel's decision had been issued, but always without success. They were given e-mail addresses of departments which might hold the relevant records, but e-mails to those addresses failed to produce the necessary information and enquiries made by C at the prison produced negative results. It may seem remarkable, but is certainly the case, that nobody whom they approached was able to tell them whereabouts in the prison system the records of an adjudication appeal would have been held.

30. One possible explanation for the failure to locate the documents is, of course, that they never existed and that the Applicant had made up the story about a successful appeal. However his evidence about that cannot be dismissed as incredible: I have experience of previous cases in which adjudications were overturned but remained on the prisoners' records and there was great difficulty in having the records corrected.

31. The 14-day deadline for the panel to issue its decision expired on Thursday 21 May 2020. The panel was clearly anxious to meet that deadline. On the afternoon of Friday 15 May 2020, the Board's case manager e-mailed the Applicant's solicitor stating that the panel chair had requested the closing representations and asking for them to be submitted as a matter of urgency. On the same afternoon the case manager e-mailed C, D and the solicitor setting out what was required.

32. It appears that a preliminary draft of the panel's decision had been drafted by 15 May 2020 but was awaiting the anticipated representations and the documentation relating to the adjudication appeal: the copy of the decision with which I have been provided has track changes showing that the date was originally shown as 15 May 2020 but that it was later altered to 19 May 2020.

33. On the morning of Tuesday 19 May 2020, the Applicant's solicitor sent an e-mail to the case manager in which she explained that the prison were said to be working on finding a record of the adjudication appeal but she had not received anything yet and would chase them. The case manager acknowledged that e-mail.

34. At 3.22 p.m. that day the case manager sent an e-mail to the secure e-mail address of the solicitor's firm stating that *"the representations will need to be received today in order for the panel to meet the 14-day deadline for issuing reasons".*

35. No reply was sent to that e-mail that afternoon, and the solicitor very frankly admits in her representations in support of this application that it was not opened and therefore not seen by her until the following day (20 May 2020). She evidently assumed that it was by then too late to send in representations or to request further time. The panel's decision had been made on 19 May 2020, though the formal decision letter was not actually issued by the case manager until 1.37 p.m. on 22 May 2020.

The Request for Reconsideration

36. In support of the ground of irrationality the Applicant's solicitor submits that the panel
    (1) failed properly to apply the test for release on licence;
    (2) reached a decision to recommend a move to open conditions without first considering whether the Applicant met the test for release on licence;
    (3) failed to assess the Applicant's risk of serious harm as opposed to his general risk to the public;
    (4) failed to have regard to certain parts of the evidence given by C and D which supported the case for release on licence; and
    (5) failed to pay sufficient regard to the Applicant's own evidence.

37. In support of the ground of procedural unfairness the Applicant's solicitor submits that the panel
    (1) made its decision without considering representations by the Applicant's solicitor;
    (2) made its decision without making it clear that it was setting a deadline for such representations to be provided; and
    (3) made its decision without considering evidence received by the solicitor after the hearing on 7 May 2020.

38. As regards to this last point, the solicitor refers to communications received by her from an officer who had escorted the Applicant to and from the hearing and been present throughout it. She summarises this evidence as follows: *"Those communications … confirm that [the officer] witnessed [C] telling the Applicant that he believed there was an extremely good chance of him being granted release, and that he believed this is what would happen. Whilst we accept that this was not his evidence to the panel, we are of the view that [the panel] should have been able to view this correspondence."*

The reply on behalf of the Secretary of State

39. As indicated above, the Secretary of State offers no representations.

Discussion

Procedural unfairness

40. It is convenient to discuss first the ground of procedural unfairness.

41. It is of course a fundamental right of a prisoner to have representations made by him or on his behalf, after all the evidence has been given, considered by the panel which is considering his case. That did not happen in this case. It is necessary to examine closely how that came about.

42. When it was agreed at the conclusion of the hearing on 7 May 2020 that the Applicant's solicitor should provide her representations in writing, no time limit was set. It must however have been understood that the representations should be presented in good time before the expiry of the 14-day time limit for the panel's decision to be issued. It must also have been understood that the representations would need to deal with the evidence which it was anticipated would be obtained about the appeal against the adjudication for the incident of November 2019, and that they would not therefore be supplied until that evidence had been obtained. Nobody could have anticipated that there would be such difficulty as there in fact was in obtaining that evidence.

43. Although the panel chair was clearly anxious to receive the representations, no deadline for their submission was stipulated until the case manager sent her e-mail at 3.27 p.m. on 19 May 2020. That e-mail purported to set a deadline of close of play on that same day. I cannot accept that that was sufficient notice of the deadline. The 14-day deadline for the issuing of the panel's decision still had two days to run, and in any event greater notice should clearly have been given. That was particularly so given that the Board (though not necessarily the panel

members) had been made aware of the difficulties which C and the solicitor were having in attempting to obtain the documentation relating to the appeal against the adjudication.

44. If necessary, the panel could have directed an adjournment to enable efforts to obtain that evidence to continue. In retrospect it can be seen, though nobody realised it at the time, that it was a mistake to expect the Applicant - even with the assistance of his solicitor and probation officer - to produce the documentation. The responsibility should have been that of the prison authorities in whose possession the documentation, if it existed, could be expected to be.

45. In these highly unusual circumstances there is no criticism to be made of anyone but the end result of what happened was that the Applicant was deprived of his right to have representations on his behalf considered by the panel when it made its decision. There can be no doubt that this amounted to a procedural irregularity.

46. Not all procedural irregularities amount to procedural unfairness, but this one was clearly a serious one and cannot be dismissed as insignificant. It is not known what representations would have been made by the solicitor but it is likely that they would have included some of the points which she now makes in support of this application for reconsideration (especially in relation to evidence given by C and D which was not mentioned in the panel's decision). It is impossible to say whether her representations would have resulted in a different outcome, but any fair-minded and properly informed member of the public would certainly have regarded the mere fact that the panel did not have the benefit of representations on the Applicant's behalf as amounting to a fundamental flaw in the proceedings resulting in unfairness.

47. One point which the solicitor would evidently have made is the one based on the evidence of the escorting officer. It is doubtful, though, whether that evidence (if it had been available to the panel) would have made any difference to its decision. It was probably unwise of C, in the course of what was clearly a friendly "*off the record*" chat, to offer the view that - despite his own and D's recommendations - the panel was likely to direct release. That was all that this evidence amounted to. It did not undermine C's own evidence to the panel. It is not uncommon for a witness, though offering his own genuinely held opinion in evidence, to anticipate that the panel may well prefer a different view. What might be said, though, is that the reading of the situation by an experienced probation officer demonstrates that this was not an open and shut case and that the solicitors' other representations might have tipped the scales in the Applicant's favour.

48. In all of these circumstances I am bound to conclude that the complaint of procedural unfairness has been established, and that the case must be reconsidered on that ground.

Irrationality

49. In the light of my conclusion on the issue of procedural unfairness it may not be strictly necessary to address the issue of irrationality. However in fairness to the solicitor and to the panel it is appropriate to set out my conclusions on that issue.

50. The solicitor draws attention to the fact that the panel's conclusion as set out in its decision letter began by stating that the panel agreed with D that there was not a significant risk of abscond so the panel was prepared to recommend the Applicant's return to open conditions from which he would benefit. Only then did the panel state its conclusion about the Applicant's suitability for release on licence, as follows:

> *"The panel does not consider your risk yet manageable on licence in the community, as first your trustworthiness needs to be tested and you need to have the opportunity to develop the skills necessary to lead a pro-social lifestyle in the community. You are not ready to be released now."*

51. It is a fair point that this gives the impression that the panel may have addressed the two issues which it had to consider in the wrong order. A prisoner's suitability for open conditions of course only arises if the panel has first decided that the test for release on licence is not met.

52. However, although this is a fair point, the questions which ultimately need to be addressed in order to determine whether the panel's decision not to direct release on licence was irrational (within the meaning explained above) are
    (1) did the panel apply the correct test?
    (2) were its expressed reasons for its decision reasonable ones? and
    (3) was there sufficient evidence to support them?
    If the answer to each of those questions is "yes", the decision cannot be regarded as irrational.

53. <u>The test.</u> At the outset of its decision the panel correctly set out the test for release on licence, as follows:
    > *"The Parole Board shall not direct release unless it is satisfied that it is no longer necessary for the protection of the public that you should be confined."*

54. Whilst the panel's conclusions could have been more clearly expressed and it might have been better if the issues of suitability for release and suitability for open conditions had been separated out and addressed in sequence as the solicitor suggests they should have been, there is nothing to suggest that in deciding not to direct release on licence the panel applied any different test from the one which it set out.

55. Another criticism made by the solicitor is that in applying the test the panel did not refer to the Applicant's risk of serious harm to the public as opposed to a more general risk. Whilst it would again have been preferable if the panel had referred specifically in its conclusions to risk of serious harm, when the decision letter is viewed as a whole (and when it is borne in mind that all Parole Board panels are fully aware that it is risk of serious harm which matters) it becomes clear that that is the risk which the panel had in mind in making its decision. In particular, in the risk assessment section of the decision letter the panel expressly adopted the probation service's assessment of the Applicant's risk of serious harm to the public as being at the medium level.

56. <u>The expressed reasons.</u> The two reasons given by the panel were, as indicated above, (a) that the Applicant's trustworthiness needs to be tested and (b) that he needed to develop the skills necessary to lead a pro-social lifestyle in the

community. These are reasons commonly given by panels when deciding that a prisoner is not ready for release. Whilst again the panel's reasoning could have been more clearly spelt out, it was clearly of the view that unless and until those two things had happened it could not be satisfied that the test for release was met. That, if supported by the evidence, was a reasonable ground for its decision.

57. Evidence to support the panel's conclusion. There was, I am satisfied, ample evidence to support the panel's conclusion. At the start of his sentence the Applicant had an entrenched criminal lifestyle and attitudes, and presented a very high risk to the public. It is generally accepted that before release on licence can be justified such an offender needs to be thoroughly tested in open conditions and to complete a staged and carefully controlled process of reintegration into the community. Due to the Applicant's return from open to closed conditions (however reasonable or unreasonable that may have been) he had not yet completed the necessary process of testing and gradual reintegration. An additional point is that his behaviour in custody had on occasions been unacceptable, raising concerns about his willingness and ability to comply with supervision in the community.

58. The solicitor identifies some pieces of evidence given by C and D to which the panel did not refer to its decision. She summarised that evidence as follows:

> *"[C], when asked, said that he felt the question of imminence depended on whether the Applicant was adequately managed. He then confirmed that he felt that the Risk Management Plan did not need adding to, and that risk could be managed in the community. He also agreed that there would be observable signs if risk was escalating in the community. Similarly, when asked whether her view was that the Risk of Serious Harm was "not imminent, but not manageable" [D] confirmed that she had included things in the Risk Management Plan to manage the risk, and that she could not say that risk was not manageable in the community. She also agreed that there would be noticeable warning signs if the Applicant's risk was increasing, and that this would lead to recall."*

59. These were significant pieces of evidence, and it is unfortunate that they were not referred to by the panel in its decision. However, a panel is not obliged to accept the views of professional witnesses: its task is to make its own assessment of risk. Furthermore imminence of risk, whilst a relevant factor in assessing suitability for release on licence, is not a determinative one. The panel's task is not confined to assessing the prisoner's risk in the short term: it has also to consider the longer-term risk.

60. On balance, whilst accepting the force of the some of the points made by the solicitor, I have come to the conclusion that the panel was entitled on the whole of the evidence to come to the conclusion which it did and that all three of the questions posed in paragraph 50 above must be answered in the affirmative.

61. It follows that I cannot conclude that the panel's decision, whilst open to some criticisms, crossed the high threshold which is required for a finding of irrationality. That is not to say that other panels might not have reached a different conclusion. Since this case is now to be reconsidered by another panel (see below), that panel will have the opportunity of forming its own view with the benefit of legal

representations and, it is to be hoped, evidence to confirm or disprove the Applicant's assertion that the adjudication referred to above was quashed on appeal.

Decision

62. For the reasons which I have explained above, this application succeeds on the ground of procedural unfairness but not on the ground of irrationality.

Directions

63. I have given careful consideration to the question whether this case should be reconsidered by the original panel or whether it should be considered afresh by another panel.

64. I have no doubt that the original panel would be fully capable of approaching the matter conscientiously and fairly. However, justice must not only be done but be seen to be done. If the original panel were to adhere to its previous decision, there would inevitably be room for suspicion that it had simply been reluctant to admit that its original decision was wrong. However inaccurate or unfair that suspicion might be, it would be preferable to avoid it by directing (as I now do) that the case should be reheard by a fresh panel.

65. The following further directions are now made:
    (a) The re-hearing should be expedited.
    (b) The original decision must be removed from the dossier and must not be seen by the new panel.
    (c) The new panel should be told that this is a reconsideration but not made aware of the reasons why it was ordered.
    (d) The new panel should also be advised that the fact that this is a reconsideration should not in any way affect their decision. It is a complete re-hearing.

66. The solicitor may wish to invite the chair of the next panel to issue a direction that the Secretary of State should ensure an investigation of the records of adjudication appeals and the production of any records relating to the appeal by the Applicant (if there was one) against the adjudication referred to above.

Jeremy Roberts
30 June 2020